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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC.; and AMERICAN ADJUSTMENT COMPANY, INC.,

Petitioners,

v.

HIGHLANDS INSURANCE COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF

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14 pp

QUESTION PRESENTED

Whether the court of appeals' refusal to remand the case for further proceedings, after determining that the district court mistakenly resolved a dispositive fact issue as a matter of law, coupled with the court of appeals' refusal to review the correctness of the district court's ruling, operated to deprive Petitioners of due process.

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National Union Fire Insurance Company of Pittsburgh, Pennsylvania, American International Group, Inc. and American Adjustment Company, Inc., pursuant to Rule 15.6 of this Court,

submit the following reply brief in support of their petition requesting that a Writ of Certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, entered July 21, 1994, is reported at 27 F.3d 1027, and is reprinted in the Appendix attached to the Petition for Writ of Certiorari, as Section A.

ARGUMENT AND AUTHORITIES

A. Respondent's Brief in Opposition misstates the record.

In its Brief in Opposition, Respondent repeatedly misstates the record, by asserting that the district court's decision to construe the contract as a matter of law was made *after* the charge was read to the jury, rather than before. This representation not only is false, as will be demonstrated below, but also is directly relevant

and material to the question presented in the Petition. Petitioners' argument is based precisely on the fact that the district court ruled *prior to the charge* that the question was one of law, thereby precluding any opportunity for Petitioners to request that a policy limits question be included in the charge, and any requirement that they do so. *Petition at 19-20.* The district court's decision set the stage for the due process violation, which occurred when the court of appeals held that the issue was not one of law, but one of fact, and that Petitioners had waived the issue by not asking that a policy limits question be included in the charge. *Id.*

At page 4 of the Brief in Opposition, for example, Respondent asserts that the policy limits decision was made "after the jury instructions were given to the jury":

> During closing arguments, after the charge conference and *after the jury instructions were given to the jury*, Petitioners' counsel attempted to argue policy limits.

Brief in Opposition at 4 (emphasis added). To the contrary, the record plainly shows that the argument referred to (and indeed all

of the comments excerpted at pages 4 through 6 of the Brief in Opposition) occurred *prior to* the time the jury instructions first were given to the jury. The excerpted comments appear at pages 648 through 650 of the Transcript. The district court's ruling (that the policy limits issue would be decided by the court) appears at page 650. The charge was not given to the jury until *after* the court's ruling, and indeed, not until after the closing arguments were concluded. The reading of the charge appears at pages 670 through 690 of the Transcript.

Therefore, it is indefensible for Respondent to represent to this Court that the closing arguments and the district court's ruling occurred "after the jury instructions were given to the jury." *Brief in Opposition at 4*. Even worse, Respondent attempts to accuse Petitioners of some sort of misstatement, for having portrayed the record accurately:

> Although Petitioners argue, on page 6 of their Statement of Case, that they argued at trial that "the issue should be resolved by the Court, as a matter of law," they do not reveal that such arguments

> were first made during closing arguments and only *after the jury charge was submitted and argued.*

Brief in Opposition at 2 (emphasis added). Respondent's statement is inaccurate in two respects. First, the objections which were made "during closing arguments" did not occur "after the jury charge was submitted," but *before* the jury charge was submitted. The closing arguments are transcribed at pages 631 through 636 (plaintiff's closing), pages 637 through 658 (defendants' closing) and pages 659 through 669 (plaintiff's rebuttal). The court's charge is submitted to the jury at pages 670 through 690.

Second, it is *not* true that Petitioners asserted their objections (i.e., their argument that the policy limits issue was a question of law) for the first time during closing arguments. To the contrary, Petitioners' counsel argued to the district court that the question was one of law on repeated occasions prior to the discussion which was held during closing arguments. For example, at page 474 of the Transcript, Petitioners' counsel moved the district court "for judgment as a matter of law on the issue of

the limits of the OCP policy." Tr. 474, lines 15-16. At page 483, Petitioners' counsel again asked for judgment as a matter of law, stating with regard to the OCP policy: "There is no ambiguity." Tr. 483, line 19. The district judge deferred her ruling, saying that she would "carry your motion with the rest of the case." Tr. 487, line 6.

When the misstatements set forth in the Brief in Opposition are disregarded, very little is left. Given the correct sequence of events -- i.e., that the district court ruled the question to be one of law, and *then* submitted the jury charge -- it is readily apparent that the decision to construe the policy limits as an issue of law precluded any opportunity for Petitioners to submit a jury question, or any requirement that they do so. Whether the district court's determination was right or wrong, it constituted the first prong of the dilemma of which Petitioners now complain.

B. The decision of the court of appeals violated the rule of *Saunders v. Shaw*.

Respondent's Brief in Opposition also misses the mark by concentrating exclusively on the district court's ruling. Respondent

claims that "Petitioners were given complete opportunity to offer, rebut, examine and cross-examine on the issue of policy limits," and therefore that this case is not similar to *Saunders v. Shaw*, 244 U.S. 317 (1917). *Brief in Opposition at 3.*

The district court's ruling, however, is not the problem, or at least it is not the entire problem. Petitioners (and, for that matter, Respondent) *agreed* at trial with the district court's assessment that the question was one of law. *See Petition at 19-20.* It was the decision of the *appellate* court that deprived Petitioners of due process. When the appellate court ruled that the question was one of fact, it changed the law of the case, and therefore was required to remand the case for further proceedings, rather than to rule that the issue had been "waived" by the "failure" to submit a jury question. As was pointed out in the Petition, no due process violation occurs in a *Saunders*-like situation until the *appellate* court renders a judgment inconsistent with that of the district court, without remanding for further proceedings, and thereby forecloses the litigant's opportunity to try

his case in accordance with the rules of law which ultimately will control it. *See Petition at 14* (quoting from *Saunders*, at 320: "The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask for a ruling or to take other precautions in advance."); *and at 17* (quoting from various decisions of this Court, to the effect that a denial of due process under the rule of *Saunders v. Shaw* occurs when an appellate court refuses to remand for a new trial, even though its decision alters retroactively the procedural landscape of the case).

Respondent barely addresses the decision of the court of appeals, and certainly fails to demonstrate that its ruling comports with the principle of *Saunders*. Until that ruling was made, Petitioners were entitled to rely on the district court's determination that the policy limits issue was a question of law. They were not required to submit a jury question, after being told by the district court that the issue *would not be submitted* to the jury. For the court of appeals then to decide that the issue had

been waived by failure to submit a jury question violates the rule.

Finally, Respondent mischaracterizes the record when it claims that Petitioners acquiesced in the district court's decision to determine the issue "whether factual or legal." *Brief in Opposition at 6*. The record -- including the excerpts quoted by Respondent -- demonstrates that Petitioners "acquiesced" only in the determination that the issue was one of law. Indeed, Petitioners *prevailed* on that point. Contrary to Respondent's assertions, there is no indication in the record that Petitioners acquiesced or concurred in any decision by the trial court that it (and not the jury) should decide a contested issue of fact.

CONCLUSION

If the court of appeals was correct in its conclusion that the issue was one of fact for the jury, then the district court erred in deciding that it was a question of law. In that event, the court of appeals should be instructed to remand the case to the district court

so that the issue may be resolved by a jury. If the court of appeals was incorrect, and the question *was* one of law, then the court of appeals' refusal to review the issue was erroneous, and the court of appeals should be instructed to review the trial court's legal determination of the policy limits under the appropriate standard of review. In either event, National Union requests that this Court reverse the decision of the court of appeals that the issue was waived, and asks that the principal amount of the judgment be reduced to $500,000, or that the consideration of the amount of damages be remanded for further proceedings.

WHEREFORE, Petitioners respectfully pray that their Petition for Writ of Certiorari be granted; that this Court reverse the decision of the court of appeals; that this Court reduce the principal amount of the judgment to $500,000 or, in the alternative, that this Court remand the case to the lower courts for further proceedings; and that Petitioners be awarded such other and further relief to which they may justly be entitled.

Respectfully submitted,

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